ISSUED AUGUST 27, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

4623 MONICA CORP. dba Detour 1087 Manzanita Street Los Angeles, CA 90029, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6919 File: 48-10740 Reg: 96038143 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

4623 Monica Corp., doing business as Detour (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its on-sale general public premises license for its bartenders having served alcoholic beverages (beer) to two patrons who were at the time obviously intoxicated, and for a series of incidents involving simulated sexual intercourse between a male entertainer and one of appellant's bartenders, the exposure of the penis of the male entertainer, and the fondling of the genitals of the male entertainer by the male entertainer himself, by two of appellant's bartenders, and by an unidentified patron,

[1]The decision of the Department, dated July 3, 1997, is set forth in the appendix.

all being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivisions (a) and (b), in conjunction with Business and Professions Code §25602, subdivision (a), and Rules 143.2, subdivision (3), 143.3, subdivisions (1)(a) and (1)(b), and 143.3, subdivision (2).

Appearances on appeal include appellant 4623 Monica Corp., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 4, 1977. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartenders had served alcoholic beverages to two obviously intoxicated patrons, and that a series of incidents involving a male dancer, two of appellant's bartenders and an unidentified patron violated various subdivisions of Rules 143.2 and 143.3.

An administrative hearing was held on March 12, 1997, at which time oral and documentary evidence was received. At that hearing, two Los Angeles police officers, Julio Duarte and Harold Marinella, described what they saw in the course of an undercover visit to appellant's bar on the evening of April 12, 1996. John Bailey, appellant's president and sole shareholder, and Thomas Jelonek and Cord Gowen, appellant's bartenders, testified on appellant's behalf.

Subsequent to the hearing, the Department issued its decision which sustained the allegations in the accusation. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues:

(1) Appellant's motion for reconsideration or to re-open the proceedings should have been granted; (2) the Department failed to produce substantial evidence in support of its allegations; (3) the dancer, Braun, was an independent contractor not punishable under Rule 143.3, and since the licensee maintained strict policies precluding any performances violative of Rule 143.3, it cannot be held liable for Braun's misconduct; and (4) the penalty is grossly excessive.

DISCUSSION

I

Appellant contends that the Administrative Law Judge (ALJ) should have granted its motion to reopen the proceedings to permit it to offer newly discovered evidence purporting to demonstrate selective enforcement by the Department targeting known gay establishments, in violation of its constitutional right to equal protection of the law. Appellant's motion, filed after the close of the administrative hearing but prior to the issuance of any proposed decision by the ALJ, cited as newly discovered evidence an article published in the Los Angeles Times reporting the results of a Los Angeles Police Department survey of its enforcement activities involving "gay bars", purporting to show they were inspected on a more frequent basis than "straight establishments". Appellant has attached additional news articles to the same effect to his brief in this appeal.

The Department opposed appellant's motion, and the ALJ denied it, stating, in part, in his proposed decision:

> "While the article set forth a series of complaints by alleged members of the gay community against the Los Angeles Police department and Alcoholic Beverage Control agents, the article also quoted a police official who cited arrest and violation records, and stated that each inspection was warranted. The article is simply a hearsay recitation of complaints from the gay community with a response from an official or officials of the Los Angeles Police department. There is nothing in this record to suggest that the subject premises has ever been subjected to discriminatory enforcement and it should be noted that this licensed premises, since June of 1996, has been operating under a license which has been revoked but the revocation has been stayed until June 18, 1998. More careful supervision of a license in this situation could well be justified."

Appellant's motion was not accompanied by any declarations or evidence other than the Los Angeles Times news article. That report is hearsay. More importantly, there is nothing in the report that refers in any direct manner to appellant's establishment, and appellant made no attempt during the evidentiary phase of the administrative hearing to establish any sort of discrimination or selective enforcement.

Moreover, the evidence supporting the Rule 143 allegations is only half-heartedly contested; appellant's principal argument is that it cannot be held liable for the conduct of an independent contractor entertainer. As the discussion which follows will demonstrate, that is a mistaken position. Indeed, the conduct which occurred demonstrates the wisdom of the ALJ's suggestion that a licensee operating under a stayed revocation may well warrant closer scrutiny.

This is not a life style case, but one based upon conduct. The evidence does not indicate otherwise.

II

Appellant contends that there is no substantial evidence to support the determination that appellant's bartenders served alcoholic beverages to two obviously intoxicated patrons.

The testimony of police officer Duarte, which the ALJ accepted as credible, established that patron Hanifan exhibited sufficient symptoms of intoxication - stumbling, unsteady gait, inability to walk a straight line, staggering, head slumped on the bar for three to five minutes, flushed face, red and watery eyes, difficulty maintaining balance while engaged in conversation with bartender - that appellant's bartender or bartender assistant, William Coughlin, was reasonably on notice that Hanifan should not be served any additional alcoholic beverages. Duarte also testified that when he spoke to Coughlin, Coughlin told him he did not have a problem with serving drunks, as long as they were not causing a problem. In addition, Coughlin rationalized his action by stating Hanifan would not be driving,

Coughlin was no longer an employee, and did not testify at the administrative hearing, so there is no claim that he did not make the statements attributed to him by police officer Duarte.[2] Cord Edward Gowen, another one of appellant's bartenders, denied observing the symptoms described by police officer Duarte.

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[2] At one point in appellant's brief (App.Br. p.9), it suggests, citing testimony from Thomas Jelonek, that Coughlin was only a "bar back," a position akin to a busboy, without authority to sell or serve alcoholic beverages. However, other references to Coughlin in the same brief appear to concede he was a bartender. (See, e.g., App.Br. pp.2, 5, 18.) This is probably immaterial, since Coughlin was working behind the bar and in a position where he could act as a bartender.

Duarte's testimony, reinforced by the admissions attributed to Coughlin which indicated a lack of concern over serving drinks to intoxicated patrons, is sufficient to support the allegations of count I of the accusation.

Count 2 of the accusation involved the sale of a beer to patron Ross by Thomas Jelonek, another bartender. Marinelli described his observations of a number of symptoms which, in combination, led him to conclude that Ross was obviously intoxicated - leaning against the bar, using the bar to maintain balance, bumping into patrons, staggering, slurred speech, red and watery eyes.

Jelonek admitted serving Ross a beer, but denied seeing Ross display any of the symptoms attributed to Ross by Marinelli.

We believe there is sufficient credible evidence to satisfy the test set forth in Schaffield v. Abboud (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], a case cited by appellant. Schaffield v. Abboud adopts the test set forth in People v. Johnson (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105], overruled on other grounds in Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1027 [272 Cal.Rptr. 272], stated as follows:

> "The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are 'plain' and 'easily seen or discovered.' If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily discovered, or because, having observed, he ignored that which was apparent." (Italics in original.)[3]

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[3] People v. Johnson was overruled only to the extent it suggested that a police officer could not testify concerning his opinion that a person was obviously intoxicated. Appellant's discussion (at App.Br. p.18) of Paez v. Alcoholic Beverage Control Appeals Board completely misstates its holding in other respects. Paez denied review of an appeal contending such testimony had been improperly

Based upon the testimony of officers Duarte and Marinelli, there was ample evidence that Coughlin and Jelonek either failed to observe what was plain and easily discovered, or, having observed, chose to ignore that which was apparent.

In the final sense, the Appeals Board is guided by the general rule that it is not its function to choose between conflicting testimony. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The contention that the failure to analyze the beverages served to Ross and Hanifan to establish that they contained in excess of one-half of one percent alcohol by volume amounts to a failure of proof is without merit. Duarte saw the pitcher refilled from a tap, and there is testimony from Jelonek that the only beverages on tap were Budweiser, Miller and Miller Light [RT 107]. Ross was served a bottle labeled Miller Light, so it may be presumed that it was beer. It should also be noted that Jelonek admitted serving Ross a beer [RT 96].

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admitted, stating there had been no motion to strike such testimony, and that even if such a motion had been made and denied, a denial would not have been an abuse of discretion.

Appellant also challenges the sufficiency of the evidence to support count 5 of the accusation, which charged that appellant permitted the entertainer, Edward Braun, together with Jelonek, the bartender, to perform acts which simulated sexual intercourse, in violation of Rule 143.3(1)(a) (4 Cal.Code Regs. §143.3, subd. (1)(a)). Appellant asserts that the evidence showed nothing more than a completely clothed and unexposed entertainer laying on a bar counter while another completely clothed male stood between the dancer's legs while the dancer rocked back and forth.

In fact, the evidence shows much more. Police officer Duarte testified [RT 27-30] that while Braun was dancing on the bar, Jelonek, began rubbing Braun's genital area. Braun then laid down, lifted his legs and placed them on Jelonek's shoulders, and the two then began rocking back and forth. As this took place, Jelonek reached his hand inside Braun's underwear and vigorously rubbed Braun's crotch area.

The "completely clothed and unexposed" Braun was clad in briefs and black boots and nothing more [RT 25]. During his interlude with Jelonek, his exposed penis could be seen [RT 30].

Appellant's reliance on a dictionary definition that states sexual intercourse requires penetration of the anus or vagina, to support its claim that there must be simulated penetration, is unpersuasive. It does not take much imagination to believe that the rocking back and forth of closely joined pelvic areas - Duarte testified that there was contact between Jelonek's hips and Braun's crotch area [RT 55] - preceded by foreplay can be perceived as simulated sexual intercourse.

Finally, appellant alleges that in the remaining Rule 143 counts, there was no credible or substantial evidence of skin to skin contact, and that any such contact was de minimus and fleeting in the course of a long dance performance.

Once again appellant ignores the testimony of police officer Duarte, which the ALJ obviously deemed credible. According to Duarte, two different bartenders reached inside Braun's underwear and massaged his genital area [RT 29, 32].

That such contacts may have been fleeting is not controlling. What is critical is that they occurred at all.

III

Appellant asserts it cannot be held liable for Braun's conduct because (1) Braun was an independent contractor; (2) Braun was not personally subject to liability under Rule 143.2 or 143.3; and (3) appellant has strict policies precluding performances violative of Rule 143.

Appellant argues that a scheme which imposes liability where the active participant is not subject to criminal liability, and the misconduct itself is not within the exercise of the activities licensed, is unconstitutional, so that absent per se criminal misconduct during the exercise of the license privilege, there can be no independent contractor misconduct imputed to a licensee.

In Rob-Mac Inc. v. Department of Motor Vehicles (1983) 148 Cal.App.3d 793 [196 Cal.Rptr.398], the court upheld a license suspension where an auto dealership salesman had sold motor vehicles after resetting the odometer in violation of the Vehicle Code. The court rejected the independent contractor defense, holding that the owner of a license is obligated to see that the license is

not used in violation of the law. The court held further that, by analogy to the tort law non-delegable duty theory, where an employer is under an affirmative duty by reason of his relationship to others, he cannot escape responsibility by delegating that duty to an independent contractor. The auto dealer's duty to protect the public against loss or damage by reason of fraud did not permit him to escape responsibility by delegating the details of his sales operation to an independent contractor.

By the same token, appellant has elected to provide a form of entertainment to its patrons which is the subject of strict rules regarding attire and conduct, the object of which is to protect the public welfare and morals by prohibiting certain forms of lewd and lascivious conduct. Appellant cannot escape liability if the dancers he provides, under whatever form of employment or contractual relationship, engage in conduct violative of those rules.

The court in Rob-Mac v. Department of Motor Vehicles acknowledged that there might be unusual circumstances where a licensee could escape responsibility for acts of an independent contractor, but stated that a licensee who has created a climate where wrongdoing is likely to occur, or has not made every effort to discourage wrongdoing, is not free from fault. Here the evidence clearly demonstrates that the licensee created a climate where wrongdoing is likely to occur, and has not made every effort to discourage it.

Appellant knew or should have known from Braun's earlier performances that he provided sexually-oriented entertainment to mainly male patrons, and expected to receive tips from satisfied customers. Under these circumstances, Braun had an

obvious incentive to challenge the limits placed upon him by the "strict policies" appellant claims were in force.[4] As the Department argued at the administrative hearing, it was as if management was responding to the activity with a wink and a nod.

Similarly, the California Supreme Court, in Ford Dealers' Association v. Department of Motor Vehicles (1982) 3 Cal.3d 347 [185 Cal.Rptr. 453], upheld a regulation which extended to oral representations made by sales persons to customers, rejecting the contention that the regulation was either not authorized by statute or unconstitutional. In the course of so doing, the court pointed out that under the statute in question, the fact that the employees might have been held liable as individuals "was not necessary to the conclusion that liability should be imputed to their employers." (Ford Dealers' Association v. Department of Motor Vehicles, supra, at 361.)

Rule 143 makes no mention of employees, but instead governs whenever a licensee permits "any person" to perform the proscribed acts. (Compare Oxman v. Department of Alcoholic Beverage Control (1957) 153 Cal.App.2d 740 [315 P.2d 484, 490], where the court rejected the contention that, since the persons soliciting drinks were independent contractors, there could be no violation of Business and Professions Code §24200.5.)

Appellant argues that it cannot be deemed to have permitted misconduct in the licensed premises without knowledge of the occurrence and its prohibited

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[4] No evidence was offered to show that these "strict policies" were memorialized in any writing generated by appellant.

nature. Appellant boldly asserts that "liability without knowledge of the conduct and of its prohibitive nature is now conceptually and legally impossible," relying on Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], and the analysis in that case of the decision in McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8]. Neither of those cases stands for such a broad proposition.

McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion of the decision dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no actual or constructive knowledge. Although

holding that a licensee was not strictly liable for every event which occurred on the licensed premises, the court also declared (2 Cal.App.4th 379):

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity and to instruct employees accordingly. Once a licensee knows of a particular violation of law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

Appellant submits that notions of fundamental fairness encompassed in the 14th Amendment are violated by subjecting it to sanctions where the dancers are not personally liable for their conduct. Appellant forgets that the 21st Amendment gives the states wide authority to regulate the sale of alcohol. (See California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390].) Although the amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulations, its broad sweep has been recognized as conferring more than the normal state authority over public health, welfare and morals. (California v. LaRue, supra, 409 U.S. at 114-115, 93 S.Ct. at 394-395.) In that case the Court upheld Rule 143.3 as a permissible means of curtailing social problems associated with nude dance bars. In so doing, the court cautioned against second-guessing the efficacy of regulatory measures, stating "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the 21st Amendment." (409 U.S. at 116 [93 S.Ct. at 396].) (See also Ford Dealers' Association v. Department of Motor Vehicles (1982) 3 Cal.3d 347 [185 Cal.Rptr. 453], and text, supra, p.8.)

In Sunset Amusement Co. v. Board of Police Commissioners (1958) 7 Cal.3d 64, 84 [101 Cal.Rptr. 768], the California Supreme Court observed that:

> "[a]lthough as a general rule a licensing agency may not impose upon its licensees responsibility of governing conditions beyond their control [citation], a business catering to the general public may, under certain circumstances, be accountable for the disruptive conduct of its patrons, on or off the premises."

All of this, we think, points clearly to the fact that appellant cannot escape responsibility for Braun's conduct. Indeed, the fact that two of appellant's bartenders were participants in a portion of the conduct violative of Rule 143 simply adds even more force to the Department's position.

IV

Appellant's license was ordered revoked. Appellant claims the penalty is excessive.

The two sales of alcoholic beverages to obviously intoxicated patrons, both of which occurred on the same night, would, by themselves, seem clearly not to warrant revocation. Nor would the series of violations of Rule 143, all of which arose in one performance of one entertainer, albeit involving, in part, conduct of two employees, by themselves seem to warrant revocation.

It appears from the ALJ's decision that he gave an unspecified degree of consideration to four previous disciplines incurred in appellant's twenty-year license history.

One of these, a violation of Rule 143.2, subdivision (3), and Penal Code §647, subdivision (a), occurred was in 1980. Ordinarily, disciplinary proceedings this dated are given little weight by the Department.

The second, involving a violation of Business and Professions Code §25602, subdivision (a), resulted in the payment of a fine in lieu of a suspension in 1984. Even though the incident involved a sale to an obviously intoxicated patron, as does the instant case, the fact that it occurred so long ago precludes any finding that there is a pattern of misconduct.

The third disciplinary action involved a fire code violation, for which a fine was paid.

The only prior discipline which the ALJ could have considered which would appear to be significant involved an order of stayed revocation following a stipulation and waiver in June 1996 to a charge of lewd conduct in violation of Penal Code §647, subdivision (a), based upon a 1994 plea of nolo contendere by John Bailey, appellant's corporate president, to such a charge.

It seems clear that the ALJ gave at least some weight to this last disciplinary matter, since he cited it as a reason why appellant's bar might legitimately be subjected to greater scrutiny by the Los Angeles Police Department.

However, during the administrative hearing, the ALJ professed [RT 149-150] to be troubled by the extent to which the 1996 disciplinary action should be considered. Although the conduct upon which it was based (the unspecified lewd conduct which was the subject of the 1994 plea of nolo contendere) preceded the conduct which was at issue in the proceeding before the ALJ (which occurred on April 12, 1996), the stayed revocation order was not entered until June 1996.

We believe it would be unfair, in the circumstances of this case, to attribute any significant weight to the stayed revocation. The purpose of a stayed

revocation is to induce law-abiding behavior through the fear of greater punishment if it is not forthcoming. Here, the conduct for which appellant is to be disciplined took place before that sword of Damocles had been hung over appellant's head. While we acknowledge that the Department has a great deal of discretion when it comes to determining what is an appropriate penalty, in our thinking, license revocation for sales to two obviously intoxicated patrons and a series of Rule 143 violations arising from a single performance by one entertainer, is unreasonable. For these reasons, we believe the penalty of revocation was an abuse of discretion, and that some lesser penalty is more appropriate.

CONCLUSION

The decision of the Department is affirmed, except as to penalty. The penalty portion of the decision is reversed, and the case is remanded to the Department for reconsideration of the penalty.[5]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.